



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

Mr. Pomeroy, and are sustained by a large array of English authorities. 2 L. C. E. 1262.

We are glad to bid adieu to the old landmark. Our only regret is that the court did not honor it with special mention. The case was cited and quoted from at length in the brief of appellant's counsel. The omission of the court to expressly overrule the case seems to have been deliberate and intentional. We trust that this is not to become an established custom of the court. The inconvenience of such a practice is too obvious for comment.

The court may yet be obliged to expressly distinguish or overrule *Mayo v. Judah*. The argument will be made (though there is nothing in the opinion to justify it) that inasmuch as the contract in the principal case was a New York contract, and therefore to be governed by the New York law, the doctrine of the New York courts that such a stipulation is not a penalty was necessarily applied. We think, however, that the practitioner may safely turn to *Mayo v. Judah* in his 5th of Munford, and mark it overruled. It is as dead as the penalty-loving *Judah* himself—whose spirit, let us hope, is undisturbed by the thought that eighty years later he might have claimed the penalty of his bond. W. M. L.

HOCKMAN, BY &C. V. HOCKMAN.*

Supreme Court of Appeals: At Wytheville.

July 30, 1896.

Absent, Harrison, J.

1. LIENS—*Priorities—Fraction of a day.* A decree rendered or a judgment confessed in vacation operates as a lien from the first moment of the day on which the decree is rendered or judgment confessed, regardless of the time of day at which it is actually rendered or confessed, and takes precedence over a deed of trust admitted to record during the same day, though in point of fact the deed of trust may have been recorded before the decree was rendered or the judgment confessed. The law takes no notice of the fraction of a day as to the lien of a judgment or decree, while a deed, as against subsequent purchasers for value and without notice, and creditors, is only operative from the time it is admitted to record.

Appeal from the decree of the Circuit Court of Roanoke county, pronounced October 13, 1893, in a suit in chancery, wherein appellant was the complainant and the appellees were the defendants.

Reversed.

This was a bill in chancery filed by the complainant for the purpose of setting aside a deed of trust made by N. Hockman to secure numerous creditors. The deed was admitted to record on the same

* Reported by M. P. Burks, State Reporter.

day that complainant's decree was pronounced, but much earlier in the day. The bill charged that the deed was made to hinder, delay, and defraud the complainant, and further that the decree, at all events, had priority over the deed.

Scott & Staples and *A. B. Pugh* for the appellant.

G. W. & L. C. Hansbrough for the appellees.

RIELY, J., delivered the opinion of the court.

There were but two questions raised or discussed in this case: The priority of lien between the decree and the deed of trust, and the validity of the latter. The question of priority will be first considered.

It is provided by sec. 3567' of the Code that "every judgment for money rendered in this State, heretofore or hereafter, against any person, shall be a lien on all the real estate of or to which such person is or becomes possessed or entitled, at or after the date of such judgment, or if it was rendered in court, at or after the commencement of the term at which it was so rendered."

A decree for money, by express enactment, is embraced by the word "judgment," and consequently the statute, fixing the lien of a judgment, applies equally to decrees. Sec. 3557 of the Code.

At common law, all judgments were, by legal fiction, it is said, supposed to be entered on the first day of the term of the court at which they were recovered. This rule has always prevailed in this State whenever the action, in which the judgment was rendered, was in such condition that it might have been then tried, if it had happened to occupy the first place on the docket. And the law, not regarding fractions of a day, the lien of a judgment began by relation at the first moment of the first day of the term. *The Mutual Assurance Society v. Stanard*, 4 Munf. 539; *Coutts v. Walker*, 2 Leigh, 268; *Skipwith v. Cunningham*, 8 Do. 268; *Horsley v. Garth*, 2 Gratt. 474; *Withers v. Carter*, 4 Do. 407; *Jones v. Myrick's Ex'or*, 8 Do. 179; *Brockenbrough v. Brockenbrough*, 31 Do. 580; *Yates and Ayers v. Robinson & Berkeley*, 80 Va. 475; and *Janney's Ex'or v. Stephen's Adm'r*, 2 P. & H. 11.

It being established by the decisions of this court that under the statute, as well as by the rule of the common law, a judgment or decree recovered or rendered during the term of a court in an action or cause that was ready for trial on the first day of the term, becomes a lien on the real estate of the debtor as of the first day of the term, and that

the lien thereof begins with the day itself, the language of the statute furnishes no ground for fixing a different or other time of the day for the commencement of the lien of a judgment or decree confessed or rendered in vacation. It discloses no intention on the part of the legislature to abrogate the principle of unity of the common law, in respect to the day, as a point of time. Its provisions give no warrant for drawing any distinction in this respect between judgments and decrees pronounced in term by the courts, and judgments and decrees confessed or rendered in vacation—certainly none to the prejudice of the latter. The one class becomes a lien from “the commencement of the term,” the day on which the term began; the other, from “the date of the judgment,” the day on which it was confessed or rendered. In respect to the time of the day when the lien of each begins, there is no distinction. Both begin with the first moment of the day on which the judgment or decree becomes a lien. There is no substantial ground for the claim that the lien of a decree rendered in vacation should begin at a fractional part of the day. It is a sound policy that rejects fractions of the day in fixing the lien of judgments and decrees. It gives to the public a plain and simple rule for their guidance; diminishes the opportunity for fraud; removes ground for controversy, and tends to prevent litigation.

Wherever the legislature has seen fit to depart from the common law principle of the unity of the day, its purpose to do so has been plainly declared. It has seen proper to create a priority between executions, where two or more come to the hands of the officer on the same day; and to this end it requires him to endorse on each execution not only the year, month, and day he receives the same, but also the *time of day*. Code, secs. 3589 and 3590. It has also prescribed that a deed of trust or mortgage shall be void as to subsequent purchasers for valuable consideration and without notice, and creditors, except from the *time* that it is duly admitted to record; and that where two or more deeds of trust or mortgages embracing the same property are admitted to record on the same day, that which was *first* admitted to record shall have priority. Code, secs. 2465 and 2469. Other instances from the Code will readily suggest themselves. But the statute law of the State contains no similar provision in regard to the lien of judgments and decrees. It nowhere prescribes that the clerk shall endorse on the record the *time* of day when a judgment or decree is confessed, or when a decree made in vacation is returned to his office to be recorded. And there being no statute requiring it to be done, such endorsement

would be without force or effect. The law does not sanction what it does not enjoin.

The decree in favor of the appellant against Noah Hockman was made by the judge in vacation on June 9, 1892; was returned by him on that day to the clerk's office to be recorded, and was entered on the lien docket on November 18, 1892. The deed from Hockman to L. C. Hansbrough, trustee, to secure creditors, bears date on June 8, 1892, but was not admitted to record until the next day at 8.30 A. M. It went to record on the same day that the decree was made and returned to the clerk's office. The deed, by the express terms of the statute (sec 2465 of the Code), took effect as against the appellant only from the time it was admitted to record, at 8.30 A. M. on June 9, 1892, while under the statute and the established rule of law, notwithstanding the endorsement of the clerk that it was filed on June 9, 1892, at 12 M., the decree became a lien on the real estate of the defendant at the first moment of that day. It, therefore, has priority over the deed of trust.

This being our conclusion, it becomes unnecessary to consider the question of the validity of the deed of trust which was assailed in the bill on the ground that it was fraudulent.

The Circuit Court having held that the deed of trust took precedence over the decree, and was a valid conveyance, its decree, for the reasons herein stated, must be reversed.

Reversed.

BY THE EDITOR.—It is to be regretted that the court could not in this case reach the conclusion that it might take notice of the fractions of a day and give priority to the deed of trust over the vacation decree. That the decision operated harshly, not to say unjustly, on the trust-deed creditor, few, if any, will deny. The doctrine of relation, though well established, is a fiction of law not generally favored by the courts, and where it works injustice will not be allowed to prevail, if it can be avoided.

According to this doctrine, the whole term of the court is considered as one day, and, as a general rule, the law takes no notice of the fractions of a day. But to this there are many exceptions. As to fractions of a day, see 5 Am. & Eng. Encyc. Law (1st Ed'n), 89, 90, notes and cases cited.

In *Withers v. Carter*, 4 Gratt. 407 (cited in the opinion of the court), a decree was adjudged to have no relation beyond the day on which it was rendered, because the case in which it was rendered was on what was called the "deferred docket" and could not have been heard sooner than it was. In the same case, however, effect was given, by relation, to a judgment on a forthcoming bond during the same term and the lien of the judgment, by relation, was considered as paramount to that of the decree, and this, although the forthcoming bond did not have the force of a judgment, it not having been returned to the clerk's office, as

appears by the Reporter's statement. See on p. 408. It is believed, that this ruling is now changed by Sec. 3568 of the Code, though we are not aware that the section, as it stands, has been construed by the Court of Appeals. This is a matter of much importance in the practice. A *motion* for the recovery of money under Sections 3210, 3211, of the Code, must be made after notice and cannot be heard prior to the day to which the notice is given; and as it cannot be sooner heard, can the judgment upon it relate beyond that day?

In *Brown v. Hume*, 16 Gratt. 456, a judgment had been confessed in the clerk's office on the same day the term of the court began, but the court did not begin its actual session until after the judgment had been confessed. The statute provided that a judgment might be confessed in the clerk's office, and, as construed by the court, that meant in vacation of the court. The judgment was assailed as invalid because, as alleged, it was not confessed in vacation. But the court held that it was valid, because, when it was confessed, it was vacation. It would seem that the court could not have so held, if it had given effect to the fiction of relation, which, disregarding the fractions of the day, would have made the first day of the term relate to the beginning of that day. Here, then, was a case in which the fiction was disregarded and fractions of a day taken notice of. Does not the principal case fall within this most just and equitable ruling? But the question arising in the principal case was decided by the unanimous judgment of the court and must be considered as settled, unless and until the case shall be overruled by the court, or the law, as therein judicially declared, be changed by legislation.

KIRACOFÉ V. KIRACOFÉ AND OTHERS.*

Supreme Court of Appeals: At Staunton.

September 24, 1896.

1. EQUITABLE SEPARATE ESTATES—*Curtesy*. A married woman owning an equitable separate estate in fee may, unless prohibited by the instrument creating it, devise the same and thereby deprive her husband of curtesy therein. The power to make such devise is given by statute and has the same effect as if incorporated in the instrument creating the estate, unless such instrument restrains the power.

Appeal from a decree of the Circuit Court of Augusta county, pronounced December 10, 1895, in a suit in chancery wherein appellant was the complainant and the appellees were the defendants.

Reversed.

This was a suit in chancery instituted for the purpose of having partition of a tract of two hundred and ninety-two acres of land which had been the equitable separate estate in fee of Mary E. Kiracofé,

*Reported by M. P. Burks, State Reporter.